St. John's Law Review

Volume 16
Issue 1 *Volume 16, November 1941, Number 1*

Article 27

July 2013

Administration of the Bankruptcy Act--Report of the Attorney General's Committee on Bankruptcy 1940 (Book Review)

Samuel C. Duberstein

The essential elements of the particular torts might have been treated more specifically so that they would stand out with greater prominence.

DAVID STEWART EDGAR.*

ADMINISTRATION OF THE BANKRUPTCY ACT—REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON BANKRUPTCY 1940. U. S. Government Printing Office, 1941, pp. 330.

As an appropriate means of celebrating the ushering in of the four hundredth birthday of the English Bankruptcy Law which first saw the light of day in 1542 in the reign of King Henry VIII, and the 142nd anniversary of the first American Bankruptcy Act of 1800, the Bench and Bar are taking deep draughts of the Report of the Attorney General's Committee on Bankruptcy. It may be assumed that the "festivities" will be concluded with the passage of a Congressional Act embracing substantially the recommendations of the Committee.

When earlier bankruptcy laws were the subject of criticism, Congress, instead of correcting the evil conditions by amendatory legislation, yielded to this criticism by repealing the then existing law. (Act of 1800 repealed 1803; Act of 1841 repealed 1843; Act of 1876 repealed 1878.) However, since the Bankruptcy Act of 1898 Congress has endeavored to correct the evils which crept into the Bankruptcy Law and administration by enactment of constructive amendments, thereby avoiding a hiatus in giving relief to the debtor and the creditor—and society at large.

On April 15, 1939, Frank Murphy, then Attorney General, now an Associate Justice of the United States Supreme Court, appointed a Committee on Bankruptcy composed of the following:

Robert H. Jackson, then Solicitor General, later Attorney General (now Associate Justice of the United States Supreme Court); Francis M. Shea, Dean of the University of Buffalo Law School; Robert P. Patterson, then United States Circuit Court of Appeals Judge (now Under Secretary of War); Jesse H. Jones, Secretary of Commerce; Edward H. Foley, Counsel to Treasury Department; Jerome N. Frank, then Chairman of Securities & Exchange Commission (now United States Circuit Court of Appeals Judge); Thomas McAllister, Justice of Supreme Court of Michigan; William J. Campbell, then United States Attorney (now United States District Judge, Northern District of Illinois); and Lloyd K. Garrison, Dean of University of Wisconsin Law School.

In appointing the Committee the then Attorney General, Frank Murphy, stated:

In seeking to improve the administration of justice in the Federal courts, one of the most important subjects that requires attention, is the manner in which estates of bankrupt and insolvent estates are liquidated and administered.

---

* Professor of Law, St. John's University School of Law.

For a long time there have been complaints that the administration of bankrupt and insolvent estates in the Federal courts has been at times inefficient, costly, and dilatory. I am requesting the Committee which I have appointed to make a study of the field with a view to determining to what extent such complaints are well founded, and to formulate constructive recommendations in order to eliminate conditions that are found undesirable.

The Report represents a most comprehensive and intensive study of the shortcomings of certain phases of the Bankruptcy Law since the enactment of the July 1, 1898 Act and covers an intelligent analysis and history of bankruptcy administration together with proposed remedies as prepared by this distinguished body of experts.

The Committee's Report is based on data collected through questionnaires, interviews and examinations, reports of Referees in Bankruptcy and of examiners of the Department of Justice and the analysis of about 1700 recent bankruptcy cases in cooperation with students taking bankruptcy courses in various law schools throughout the country. The Report acknowledges credit to St. John's University Law School among the law schools which made this public-spirited contribution to the Committee's prodigious work, without expense to the Government. This extra-curricular effort, although largely clerical, must have benefited the students.

The Report indicates that the Committee made a study of previous investigations and revisions proposed by the Donovan Report (1929), the Thatcher Report (1930), the McAdoo Report (1933–1935), the Jackson Report (1936) and the National Bankruptcy Conference reports.

No proper supervision of Bankruptcy Administration could be had for the reason that the machinery and materials for adequate supervision, which required constant study and research, were lacking. While the seeming supervision is centered about the Judges of the United States District Courts (who are under no compulsion to render this service), these Judges are fully occupied with their ordinary duties, and the information as to the work of the Referees in Bankruptcy is supplied irregularly by semi-annual reports filed by them pursuant to General Order 26 and occasionally through the reports of the examiners of the Department of Justice. It is readily seen, therefore, that there is a lack of responsibility for such supervision.

The Committee's research as based upon a comparative study of variations and practices in the various Judicial Districts demonstrates (1) the present lack of and the necessity for creating a responsible and effective supervision and coordination of bankruptcy administration and (2) the necessity of improving the "Referee system" by reducing the number of Referees, and by placing them on a full-time salary basis, with pension benefits.

There is also annexed to the Report valuable appendices indicating (a) sources of the Report, (b) administration of bankruptcy cases in the United States, (c) questionnaires, (d) official forms for Referee's use, etc. and (e) tables showing studies respecting cost of administration, Referee's personnel, etc..

A general objection has been voiced against the Committee's recommendation to the effect that the service to be performed by the Administrative Office of the United States Courts which was created in 1939, is in the nature of the establishment of bureaucratic control of bankruptcies, and will result in

inefficient handling of estates. This objection falls of its own weight in that the Report merely proposes the same kind of supervision by the Administrative Office (through its Director and staff) that is now exercised by it over the entire federal judiciary, and does not seek to create a so-called policing organization or a Bureau of Bankruptcy. The appointment of the Director by the United States Supreme Court and the fact that all of the employees of the Administrative Office are subject to the control of that Court will preclude any danger of distasteful political activity. The Director is also accountable to the Judicial Conference made up of the Senior Judges of the Circuit Courts of Appeals. All of which should reassure the anxious practitioners and the Referees in Bankruptcy that there is nothing to fear from such supervision of the courts presided over by the Referees.

The Committee is justified in its opinion that the present unreliable method of coordinating information and supervising Referees can best be corrected by the establishment of a central body specifically charged with supervising and coordinating functions. To that end a Division of Bankruptcy in the Administrative Office of the United States Courts, sufficiently manned so as to insure the proper assembling of bankruptcy statistics, the examination of reports and audits and investigations and complaints regarding bankruptcy matters, will prove a boon to bankruptcy administration and the expeditious handling of bankrupt estates.

While the Constitution (Article I, Section 8) says that "the Congress shall have power * * * to establish * * * uniform laws on the subject of Bankruptcy throughout the United States", there appears to be a lack of uniformity in the practice of bankruptcy throughout the country. The service to be performed by the Division of Bankruptcy of the Administrative Office will result in a more uniform practice. The executive branch of the Government will play no part in the Division of Bankruptcy. The statistical materials on bankruptcy are now collected by the Administrative Office which may conduct an examination of the officials in order to obtain the necessary data and information. As a matter of fact, the Committee's recommendation has been put into effect under existing statutory authority and the necessary appropriation has been made by Congress for the establishment in the Administrative Office of the United States Courts of the agency which will carry out the supervision of the bankruptcy system and the bankruptcy administration. As a consequence, the earlier loose method of supervision will be done away with.

Another portion of the Report takes into consideration the need for improving the efficiency of the "Referee system" with recommendation for full-time, salaried Referees and the reduction of the number so that we may have men better qualified to perform the service required of them.

The Report of the Attorney General's Committee on Bankruptcy Administration leaves the selection and appointment of Referees to the United States District Judges, advocates a six-year term for Referees (with removal only for cause), instead of the present two-year term, and compensation on a salary basis.

It recommends that the Director of the Administrative Office of the United States Courts have two years in which to make a nation-wide survey to collect the necessary data in order to aid in fixing the salaries to be paid and the

schedules of fees to be charged. The District Judges are to be informed by the Director of the number of Referees to be appointed for each district and the territory to be served. They are then to make their individual selections, making these, insofar as possible, from the Referees then in office. Prior to the expiration of the term of a Referee, the Director is to report to the appointing Judges regarding the Referee's work so that the Judges may be thoroughly informed thereof in considering the question of his reappointment. When the full-time Referee's reappointment is in issue and an appeal is taken to the Council of Circuit Court Judges, provision is made for his remaining in office until the matter is finally determined.

The Report recommends that full-time Referees be barred from holding any other office. The prohibition against the practice of law by full-time Referees is exactly the same as that for District Judges. This provision, however, is not intended to prevent any Referee from teaching law after working hours

Based upon the survey to be made, salaries are to be fixed by the Conference, after recommendations of the Director and Councils, at rates of not less than $3000.00 nor more than $10,000.00 per annum for full-time Referees, and not more than $2000.00 per annum for part-time Referees.

The fee system of compensating Referees has been the subject of criticism for many years, particularly as it was frequently asserted that the Referee who passed on issues had thereby acquired an interest in the outcome of the litigation before him. The fee system should be abolished since under this system a Referee or Judge who renders a decision is financially interested in his own judgment—his ultimate compensation should not influence his judgment in the slightest degree. To put Referees on a salary basis will prove more satisfactory than the present fee system. As a precedent for the more effective handling of business by changing from a fee basis to salaried compensation, it is well to note that this has already been put into effect in the matter of compensating United States Clerks and United States Marshals.

The Report recommends salutary provisions relating to resignations and retirements of Referees, who may resign at half pay (compared with full pay for District Judges) after the age of 70 has been reached, if the Referee has served ten years or more.

In order to continue the system of self-supporting administration, the Report recommends the establishment of two trust funds in the Treasury of the United States. One is to contain the receipts from Referees' compensation and is to be utilized for the payment of their salaries. The other is to be composed of the funds collected for Referees' expenses and is to be utilized to pay the salaries of their clerical assistants, their office and travel expenses, etc. If there be any deficiency in these funds, the Treasury is to make the payments due out of the general funds of the United States.

It is also interesting to note that the Attorney General's Committee Report was considered at a Special Session of the Judicial Conference of Senior Circuit Judges in January, 1941, presided over by Hon. Charles Evans Hughes, Chief Justice, and that the report (with slight modifications) was approved by the Conference, which endorsed (a) the creation of a division of bankruptcy in the Administrative Office of the United States Courts to be headed by a chief,

appointed by the Director of the Administrative Office, and an adequate staff of assistants; (b) a system of full-time Referees, appointed by the United States District Judges for a six-year term at fixed salaries, and the abolition of the fee system; (c) the conducting of a nation-wide survey by the Director of the Administrative Office to determine whether or not such system is practicable throughout the country, and to report on the question of part-time Referees on a salary basis.

The Attorney General's Committee Report is a substantial contribution to the literature on the subject of bankruptcy, even though it excludes from consideration Corporate Reorganization (formerly Section 77B), Chapter X (new Corporate Reorganization) and Chapter XI (Arrangement) and Section 77 (Railroad Reorganization), topics recently considered and covered by the Chandler Act. A permanent home in the library of the Department of Justice has been found for the valuable material and data upon which the Report is based.

It is the reviewer's opinion that if the recommendations of the Report of the Attorney General's Committee embraced in H. R. 4394 now pending before Congress should be acted on favorably by that august body, much will be done to correct present evils and to restore public confidence in our bankruptcy system. The trend of the administration of bankruptcy is toward the direction of the Referees, and away from the Judges of the United States District Courts. The day is not far distant when Congress, awakened to the importance of this field of law, will create separate Courts of Bankruptcy presided over by United States Judges of Bankruptcy.

SAMUEL C. DUBERSTEIN.*

CONQUEST AND MODERN INTERNATIONAL LAW. By Matthew M. McMahon. Washington, D. C.: Catholic University of America, 1940, pp. vi, 233.

This book was completed in April, 1939, about four months before the outbreak of the existing European hostilities. Had it been written as a brief, it would have been ample to demonstrate the illegality of Hitler's activities during the past year and a half. It is clear, however, that the author had no such intention, as he could not possibly have anticipated the complete denunciation of the fundamental principles of international law that has taken place in the modern European struggle.

One reads this book with the feeling that it concerns nations of another planet because on every page principles are enunciated which are daily being violated in our current international life.

But it is not to be supposed that volumes of this character are, therefore, without practical significance. The theoretical development of international law is of enormous materiality in the furtherance of our civilization. Modern private law on its theoretical side had a great development during a period when force ruled the world of private affairs, as it does now of international

---

* Professor of Law, St. John's University School of Law.